19-15716

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

INNOVATION LAW LAB; CENTRAL AMERICAN RESOURCE CENTER OF NORTHERN CALIFORNIA; CENTRO LEGAL DE LA RAZA; UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW IMMIGRATION AND DEPORTATION DEFENSE CLINIC; AL OTRO LADO; TAHIRIH JUSTICE CENTER,

Plaintiffs-Appellees,

—v.—

KEVIN K. MCALEENAN, Acting Secretary of Homeland Security, in his official capacity; U.S. DEPARTMENT OF HOMELAND SECURITY; LEE FRANCIS CISSNA, Director, U.S. Citizenship and Immigration Services, in his official capacity; JOHN L. LAFFERTY, Chief of Asylum Division, U.S. Citizenship and Immigration Services, in his official capacity; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES; TODD C. OWEN, Executive Assistant Commissioner, Office of Field Operations, U.S. Customs and Border Protection, in his official capacity; U.S. CUSTOMS AND BORDER PROTECTION; RONALD D. VITIELLO, Acting Director, U.S. Immigration And Customs Enforcement, in his official Capacity; US IMMIGRATION AND CUSTOMS ENFORCEMENT,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF CALIFORNIA
HON. RICHARD SEEBORG, CASE NO. 3:19-CV-00807-RS

BRIEF OF *AMICUS CURIAE* LOCAL 1924 IN SUPPORT OF PLAINTIFFS-APPELLEES' ANSWERING BRIEF AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* hereby certifies that it has no parent corporations and that no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Local 1924 is a labor organization within the American Federation of Government Employees that represents the interests of over 2,500 bargaining unit employees of the Department of Homeland Security's ("DHS") United States Citizenship and Immigration Services ("USCIS") located in the National Capital Region and abroad, including USCIS Headquarters in Washington, DC, the Potomac Service Center in Arlington, VA, the Asylum Office in Arlington, VA, and the worldwide Refugee Officer Corps and USCIS districts based in Mexico, Italy, and Thailand. Local 1924's constituents include men and women who operate USCIS Asylum Pre-Screening Operation, which has been responsible for a large part of USCIS's "credible fear" and "reasonable fear" screenings, and for implementing a new DHS policy called the Migrant Protection Protocols (the "MPP"). The MPP requires individuals entering the United States from Mexico illegally or without proper documentation to be returned to Mexico for the duration of their immigration proceeding.

Local 1924 has a special interest in this case because, as the collective bargaining unit of federal government employees who are at the forefront of

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(e), *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this *amicus* brief. *See* Fed. R. App. 29(a)(2).

interviewing and adjudicating the claims of individuals seeking asylum in the United States, Local 1924's members have first-hand knowledge as to whether the MPP assures the United States' compliance with international and domestic laws concerning due process for asylum seekers and the protection of refugees and whether the MPP is necessary to deal with the flow of migrants through our Nation's Southern Border.

This brief relies solely upon information that is publicly available, and it does not rely on any information that is confidential, law enforcement sensitive, or classified. It represents only the views of Local 1924 on behalf of the bargaining unit, and does not represent the views of USCIS or USCIS employees in their official capacities.

SUMMARY OF ARGUMENT

The MPP, promulgated by the Trump Administration in January 2019, fundamentally changed our Nation's procedures for the processing of asylum applicants who enter the United States through our Nation's Southern Border with Mexico. Prior to the MPP, our country's processing of asylum applicants ensured that people fleeing persecution would not be—pending adjudication of their asylum application or anytime thereafter—returned to a territory where they may face persecution or threat of torture. That process was consistent with our country's longstanding tradition of providing safe haven to the persecuted, and was

also compelled by our international treaty obligations and domestic law implementing those obligations.

The MPP upended that process in favor of a new one purportedly designed to address the challenges faced by our immigration system as a result of migrants from Guatemala, Honduras, and El Salvador (referred to as the "Northern Triangle") entering the United States through our Southern Border. Under the new process, asylum applicants entering the United States through the Southern Border, with certain exceptions, are forced to return to Mexico where they are required to remain pending adjudication of their asylum applications. In the course of waiting for a determination of their asylum applications, many will face persecution because of their race, religion, nationality, political opinion, or membership in a particular social group. By forcing a vulnerable population to return to a hostile territory where they are likely to face persecution, the MPP abandons our tradition of providing a safe haven to the persecuted and violates our international and domestic legal obligations.

Moreover, the MPP is entirely unnecessary, as our immigration system has the foundation and agility necessary to deal with the flow of migrants through our Southern Border. The system has been tested time and again, and it is fully capable—with additional resources where appropriate—of efficiently processing asylum claims by those with valid claims while removing those that are not entitled

to protection after they undergo the process designed to ensure that they will not be returned to a place where they will be persecuted. The MPP, contrary to the Administration's claim, does nothing to streamline the process, but instead increases the burdens on our immigration courts and makes the system more inefficient.

Accordingly, for the reasons set forth herein and in the Plaintiffs-Appellees' submission, *amicus curiae* urge the Court to affirm the district court's award of a preliminary injunction enjoining Defendants from administering the MPP.

ARGUMENT

I. THE MPP IS CONTRARY TO AMERICA'S LONGSTANDING TRADITION OF PROVIDING SAFE HAVEN TO PEOPLE FLEEING PERSECUTION

A. America Has Been a Global Leader in Providing Protection to the Persecuted and Has Developed a World-Class System to Do So

America has provided a safe haven to the persecuted since even before its founding, with the country's roots sprouting from the footsteps of Pilgrims onto a Massachusetts shore in November 1620.[2] Fleeing religious persecution in their native England and exiled to Holland, the Pilgrims journeyed across the Atlantic to make their permanent home in what would become the United States.[3] Their

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[2] *See* William Bradford, *Of Plymouth Plantation* (Harold Paget ed. 2006).

[3] Jeremy Dupertuis Bangs, *Strangers and Pilgrims, Travellers and Sojourners, Leiden and the Foundations of Plymouth Plantation*, vii, 7, 605, 614, 630 (2009).

arrival etched into the Nation's identity the promise that it would serve as a safe haven for the persecuted.

The mid-19th century brought millions more refugees to America's doorstep.[4] Between 1847 and 1851, an estimated two million Irish fled starvation and disease wrought by the Great Famine, with 840,000 passing through the port of New York and many more arriving by way of Canada.[5] During the same period, German political refugees fleeing reactionary reprisals in the wake of the 1848 Revolution—known as the "Forty-Eighters"—came to America seeking freedom of thought and expression.[6]

Our Nation's treatment of refugees, however, is not unblemished, as demonstrated by United States policy towards Jewish refugees during World War

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[4] While U.S. policy during the 19th century did not draw a distinction between immigrants and refugees, historians have characterized groups whose emigration during this period was motivated by persecution, oppression, or natural disaster as refugees. *See* Philip A. Holman, *Refugee Resettlement in the United States, in Refugees in America in the 1990s: A Reference Handbook* 3, 5 (David W. Haines ed., 1996).

[5] Timothy J. Meagher, *The Columbia Guide to Irish American History* 77 (2005). *See generally* William A. Spray, et al., *Fleeing the Famine, North America and Irish Refugees*, 1845-1851 (Margaret M. Mulrooney ed., 2003). Many historians refer to these Irish migrants as refugees because their plight had roots in British colonial repression and conditions of serfdom. *See, e.g.*, Meagher, at 66-71 (discussing various historians' assignment of culpability for the famine's devastation to British colonial rule and noting "the paradox that Ireland exported food while its people starved.").

[6] *See generally* Adolf Eduard Zucker, *The Forty-Eighters: Political Refugees of the German Revolution of 1848* (1967).

II.[7] Although the United States accepted approximately 250,000 refugees fleeing Nazi persecution prior to the country's entry into World War II, it refused to accept more as Nazi Germany increased its atrocities.[8] American indifference to refugees fleeing German aggression is perhaps best reflected in the United States' denial of entry in 1939 to the *St. Louis*, an ocean liner carrying 907 German-Jewish refugees stranded off the coast of Miami.[9] The ship returned to Europe where many of its occupants met their fate—254 would die in the Holocaust.[10] Nazi Germany found it "astounding" that countries that found it "incomprehensible why Germany did not wish to preserve in its population an element like the Jews . . . seem in no way particularly anxious to [welcome Jews] themselves, now that the opportunity offers."[11]

In many ways, our Nation's refugee policy since the Second World War has sought to rectify our humanitarian failures during the most devastating of

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[7] Richard Breitman & Alan M. Kraut, *American Refugee Policy and European Jewry, 1933-1945*, 1-10 (1988).

[8] Holman, *supra* note 4, at 5 (citing Congressional Research Service 1991:556).

[9] The American Jewish Joint Distribution Committee, Minutes of the Meeting of the Executive Committee (June 5, 1939), https://archives.jdc.org/wp-content/uploads/2018/06/stlouis_minutesjune-5-1939.pdf.

[10] *Id*.

[11] Clarence K. Streit, *Germans Belittle Results*, N.Y. Times, July 13, 1938, at 12, https://timesmachine.nytimes.com/timesmachine/1938/07/13/issue.html; *see also No One Wants to Have Them: Fruitless Debates at the Jew-Conference in Evian*, Voelkischer Beobachter, (July 13, 1938), http://www.jewishvirtuallibrary.org/german-paper-ridicules-evian-conference.

international conflicts. Immediately after the war, the United States played a leading role in the formation and funding of international aid organizations such as the United Nations International Children's Emergency Fund and the World Food Programme, both of which provide support for refugees and displaced persons.[12]

After the war's end, in response to reports that Jewish survivors of the Holocaust were kept in poor conditions in Allied-occupied Germany, President Truman directed the issuance of 40,000 visas to resettle the survivors in the United States.[13] Congress also took action by enacting the Displaced Persons Act of 1948—the first major refugee legislation in American history[14]—that allowed for the admission of 415,000 displaced persons by the end of 1952.[15] The Displaced Persons Act of 1948 expired in 1952, when Congress passed the Immigration and

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[12] *See* Maggie Black, *The Children and the Nations: The Story of Unicef*, 25-35 (1986); Bryan L. McDonald, *Food Power: The Rise and Fall of the Postwar American Food System* 143 (2017).

[13] *See* Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door 1945-Present* 4-6 (1986).

[14] Congressional action surrounding refugees should not be confused with legislation regarding other forms of immigration, which dates back to the Immigration Act of 1875 and the Chinese Exclusion Act of 1882. These laws limited entry of Chinese nationals into the United States. *See* Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882); Immigration Act (Page Law) of 1875, ch. 141, 18 Stat. 477.

[15] Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009; Holman, *supra* note 3, at 5.

Nationality Act ("INA"), placing immigration and nationality laws under the same statute for the first time.[16]

American compassion toward refugees following the Second World War was not limited to Holocaust survivors. In 1953, Congress enacted the Refugee Relief Act of 1953, which, along with its amendments, authorized the admission of 214,000 refugees, including escapees from Communist-dominated countries.[17] In 1956, the United States permitted entry of over 30,000 refugees fleeing persecution in Hungary.[18] Soon after, the Refugee-Escapee Act of 1957 allowed for the resettlement of "refugee-escapees," defined as persons fleeing persecution in Communist or Middle Eastern countries.[19]

In the following years, the United States continued to welcome millions of refugees from other parts of the world. In 1958, Congress passed the Azores Refugee Act which authorized 2,000 special non-quota immigrant visas for victims of the earthquakes and volcanic eruptions that struck the Island of Fayal in 1957.[20]

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[16] *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline.

[17] Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400; *see* Holman, *supra* note 5, at 5.

[18] Carl J. Bon Tempo, *Americans at the Gate: The United States and Refugees During the Cold War* 70-73 (2008).

[19] Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639; *see* Holman, *supra* note 4, at 6.

[20] Bon Tempo, *supra* note 18, at 107-15.

After the Cuban Revolution in 1959, the United States began admitting more than 58,000 Cubans fleeing persecution under the attorney general's parole authority.[21] And in 1965, President Lyndon B. Johnson opened the country to all Cubans seeking refuge from Fidel Castro's communist regime.[22] In order to more safely and efficiently bring Cubans to the United States, the federal government created an airlift program which brought more than 250,000 Cuban refugees to the United States.[23] And around the same time, our Nation also welcomed thousands fleeing persecution from the Soviet Union, Eastern Europe, and Afghanistan.[24]

The United States also began to undertake international treaty obligations related to refugee resettlement.[25] In 1968, the United States ratified the 1967 Protocol Relating to the Status of Refugees, a treaty drafted by the United Nations High Commissioner for Refugees ("UNHCR").[26] The 1967 Protocol removed the geographic and temporal limits to refugee resettlement contained in an earlier

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[21] *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline.

[22] *Id*.

[23] *Id*. Later, in 1980, after the Castro regime announced that all Cubans wishing to go to the U.S. were free to board boats at the Port of Mariel, the United States allowed around 125,000 Cubans to enter the country under the Attorney General's parole authority. *Id*.

[24] Mark Gibney, Global Refugee Crisis 91-92 (2d ed. 2010).

[25] *See id*. at 8-13.

[26] United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

treaty, the 1951 Convention Relating to the Status of Refugees, which limited resettlement to European refugees displaced prior to 1951.[27] By ratifying the 1967 Protocol, the United States also became bound by all of the substantive provisions of the 1951 Convention,[28] and also agreed not to, among other things: (i) discriminate against refugees on the basis of their race, religion, or nationality; (ii) penalize refugees for their illegal entry or stay in the country; or (iii) engage in "refoulement"—i.e., to "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular group or political opinion." [29]

To uphold the principle of asylum in the 1951 Convention and the 1967 Protocol, and to ensure that no refugees were returned to conditions of persecution, in 1972 the Immigration and Naturalization Service (the "INS")—an agency that was created in 1933—began granting asylum to foreign nationals already in the United States and used existing procedures, such as parole, stays of deportation,

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[27] United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

[28] Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 Berkeley J. Int'l L. 1, 1 n.1 (1997).

[29] *Id*. at 2.

and adjustment of status, to allow foreign nationals who feared persecution in their homeland to remain in the country.[30]

The end of the Vietnam War created a large flow of refugees, with about 300,000 Southeast Asians entering the United States through the attorney general's parole authority between 1975 and 1980. The Indochinese Immigration and Refugee Act of 1975 funded their transportation and resettlement, and, in 1977, Congress enacted a law allowing Southeast Asian refugees who had entered the United States through the attorney general's parole authority the opportunity to become lawful permanent residents.[31] In 1977, the INS also created a special Office of Refugee and Parole to address global refugee crises and implement refugee policies.[32]

In 1980, Congress enacted the Refugee Act, which sought to convert the existing *ad hoc* approach to refugee resettlement to a more permanent and standardized system for identifying, vetting, and resettling refugees.[33] The

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[30] *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline.

[31] *Id*.

[32] *Id*.

[33] Claire Felter & James McBride, *How Does the U.S. Refugee System Work?*, Council on Foreign Relations (Feb. 6, 2017), https://www.cfr.org/backgrounder/how-does-us-refugee-system-work.

Refugee Act provided the first statutory basis for asylum in the United States[34] and aligned United States refugee law with our country's international treaty obligations, namely the 1951 Convention and the 1967 Protocol.[35] It did so, for example, by adopting the definition of "refugee" contained in Article 1 of the Convention[36] and—consistent with Article 33 of the Convention—prohibiting the removal of an alien to any country where "the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[37]

In 1990, the INS took action by promulgating a rule that mandated the establishment of a corps of professional asylum officers trained in international law and access to a center containing information on human rights.[38] The designers of

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[34] Tom K. Wong, *The Politics of Immigration: Partisanship, Demographic Change, and American National Identity* 52-53 (2017).

[35] *See I.N.S. v. Stevic*, 467 U.S. 407, 425-26 (1984).

[36] *Compare* United Nations Convention Relating to the Status of Refugees, *supra* note 27, at art. 1A(2) *with* 8 U.S.C. § 1101(a)(42)(A).

[37] *Compare* United Nations Convention Relating to the Status of Refugees, supra *note* 27, at art. 33(1) *with* 8 U.S.C. § 1231(b)(3)(A). In 1990, the Lautenberg Amendment established a reduced evidentiary burden for applications for refugee status from certain categories of people, including Jews and some Christian minorities from the Former Soviet Union, as well as some individuals from Laos, Cambodia, and Vietnam. In 2004, the Specter Amendment added certain Iranian religious minorities to this list. *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline.

[38] Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 Am. U. Int'l L. Rev. & Pol'y 43 (1994).

the 1990 asylum rule aimed to achieve twin goals of compassion (through the prompt approval of meritorious cases) and control (by discouraging spurious or abusive claims).[39]

In 1994, the United States ratified the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the "CAT"), which it had signed in 1988.[40] Article 3(1) of the CAT provides: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[41]

Following the terrorist attacks on September 11, 2001 and the creation of DHS, USCIS became the primary agency to oversee refugee and asylum affairs, in cooperation with other agencies. As to refugee affairs, in 2005, USCIS formed the Refugee Corps, which is composed of specially-trained refugee officers who travel around the world to interview refugee applicants seeking resettlement in the United States.[42]

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[39] *Id.* at 44.

[40] *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100-20, at 20 (1988).

[41] *Id.*

[42] *See* USCIS, *Refugee Timeline*, https://www.uscis.gov/history-and-genealogy/our-history/refugee-timeline.

And as to asylum affairs, USCIS set up an Asylum Division to focus on three main areas. First, the Asylum Division is tasked with administering the "affirmative asylum" process, which involves an asylum application by an individual who is not in removal proceedings and who files Form I-589 with USCIS.[43] Second, the Asylum Division determines whether individuals subject to expedited removal who indicate an intention to apply for asylum or a fear of return to their home country have a "credible fear" of persecution or torture.[44] Individuals found to have a "credible fear" of persecution or torture in the expedited removal process are placed in formal removal proceedings and may apply for asylum or withholding of removal as a defense to removal before an immigration judge, or pursue other forms of relief or protection from removal. Third, the Asylum Division evaluates whether an individual ordered removed by an immigration judge and who expresses a fear of return to the country to which he or she has been ordered removed has a "reasonable fear" of persecution or torture.[45] Individuals found to have a "reasonable fear" of persecution or torture are referred to an immigration judge for withholding-only proceedings in which they may seek withholding of removal under INA § 241(b)(3), or withholding or

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[43] INA § 208; *see also* 8 CFR § 208.

[44] INA § 235; *see also* 8 C.F.R. § 235.3 and 8 C.F.R. § 208.30.

[45] *See* 8 C.F.R. §§ 238.1, 241.8, 208.31.

deferral of removal under regulations implementing United states' obligations under the CAT by filing Form I-589.

Our country's process for dealing with displaced people is highly respected internationally. It has been highly adaptable, and it has effectively offered protection to qualified asylum seekers while also ensuring the enforcement of applicable laws and addressing national security concerns by working to mitigate fraud and abuse by bad actors. The agility and success of the system is perhaps best reflected in the sheer number of refugees absorbed into the United States since the war. In total, since the Second World War, the United States has granted entry to nearly five million refugees, representing well over 70 nationalities.[46]

B. The World Is Experiencing another Wave of Displacement

Today, the world is experiencing yet another surge in displacement wrought by conflict, civil war, famine, and violence.[47] The displacement spans the world, from the Middle East to Africa to Asia to Central America—a region that has a legacy of violence and fragile institutions resulting in part from the civil wars of the 1980s.[48] Now, perhaps more than ever, America needs to continue its longstanding tradition of offering protection, freedom, and opportunity to the

[46] David W. Haines, *Safe Haven?: A History of Refugees in America* 4 (2010).

[47] See UNHCR, *Global Trends: Forced Displacement in 2016*, at 5 (June 19, 2017), http://www.unhcr.org/5943e8a34.

[48] *Id*. at 2-3, 7.

vulnerable and persecuted.[49] Members of the *amicus curiae* signed up to be asylum and refugee officers to help our Nation fulfill that commitment. They did not sign up to administer the MPP, a policy that is contrary to our country's long-standing tradition because, as detailed below, it does not adequately protect against the forced return to Mexico of those who fear persecution in that country.

II. THE MPP VIOLATES OUR NATION'S OBLIGATIONS TO NOT RETURN ASYLUM SEEKERS TO WHERE THEY MAY FACE PERSECUTION

The non-refoulement requirement of the 1967 Protocol and the CAT is a bedrock principle of international law governing asylum that is also codified in domestic law.[50] The administration of the MPP results in a violation of the non-refoulement obligation because, under the MPP, individuals whose lives and freedoms would be threatened on the basis of their race, religion, nationality, political opinion, or membership of a particular social group in Mexico, or who would be in danger of being subjected to torture in Mexico, will be returned to Mexico. As a result, the MPP places *amicus curiae*'s members at risk of participation in the widespread violation of international treaty and domestic legal

[49] *See Examining the Syrian Humanitarian Crisis From the Ground (Part II) Before the Subcomm. on the Middle East and North Africa of the House Comm. on Foreign Affairs*, 114th Cong. 114-115 (2017) (written testimony of Leon Rodriguez, Director, U.S. Citizenship and Immigration Servs., Dep't of Homeland Security), http://docs.house.gov/meetings/.

[50] *See* 8 U.S.C. § 1231(b)(3); *see also I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

obligations—something that they did not sign up to do when they decided to become asylum and refugee officers for the United States government.

A. The MPP Provides Inadequate Safeguards against the Return of Those Who Fear Persecution in Mexico to that Country

The MPP results in violation of our Nation's non-refoulement obligation in two fundamental ways. *First,* under the MPP, "immigration officers do not ask applicants being returned to Mexico whether they fear persecution or torture in that country."[51] "Immigration officers make inquiries into the risk of *refoulement* only if an applicant affirmatively states that he or she fears being returned to Mexico."[52] Thus, under the MPP, the immigration officer makes an inquiry into the risk of refoulement only if an asylum seeker spontaneously mentions a fear of persecution in Mexico—something that most asylum seekers to whom the MPP is applicable would not volunteer when being apprehended at the border. Accordingly, with respect to those individuals who do not express a fear of being returned to Mexico, the MPP "virtually guarantee[s] . . . [a] violation of the United States' *non-refoulement* obligations."[53] The likelihood of persecution in Mexico is not remote because, as demonstrated below, many of the asylum seekers forced to return to

[51] *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 511 (9th Cir. 2019) (Watford, J. concurring).

[52] *Id.*

[53] *Id.*

Mexico under the MPP belong to groups that face persecution in Mexico (as well as perhaps in their home countries).[54]

Second, the MPP directs that individuals who, unprompted, express a fear of persecution or torture in Mexico be referred for an interview before an asylum officer—but the interview process also virtually guarantees a violation of the non-refoulement obligation.[55] "The purpose of the interview is to elicit all relevant and useful information bearing on whether the alien would *more likely than not* face persecution on account of a protected ground, or torture, if the alien is returned to Mexico pending the conclusion of the alien's . . . immigration proceedings."[56] However, unlike other immigration contexts where the "more likely than not" standard is applied, the MPP interview process does not provide the concomitant protections that are necessary to meet the high evidentiary threshold.

Specifically, the "more likely than not" standard required by the MPP has traditionally been reserved for use in full-scale removal proceedings administrated by immigration judges, not summary removal processes where asylum officers have applied lower standards—the "credible fear" standard in the expedited

[54] *Id.*

[55] *See* USCIS, Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols, at 3, Jan. 28, 2019, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf.

[56] *Id.* (emphasis added).

removal process or the "reasonable fear" standard applied to determine whether a person has a "well-founded fear" of persecution in removal and affirmative asylum proceedings.[57] In full-scale removal proceedings, asylum seekers are provided a whole host of protections such as a full evidentiary hearing, notice of rights, access to counsel, time to prepare, and a right to administrative and judicial review.[58] The affirmative asylum process includes additional robust procedural protections.[59]

The MPP, however, provides none of these safeguards. Under the MPP, the asylum officer's assessment can be performed "via teleconference, or telephonically," and the asylum seeker is not "provide[d] access to counsel during the assessment."[60] Nor is the asylum officer's determination reviewable by an immigration judge.[61] The lack of the right to prepare with counsel in connection with an MPP interview is especially problematic because, at the time of the interviews, many asylum seekers do not know whether they may face persecution in Mexico since they were only passersby through Mexico *en route* to the United

[57] *See* 8 C.F.R. §§ 208.13(b)(1), 208.16; *see also Bartolme v. Sessions*, 904 F.3d 803, 809 (9th Cir. 2018).

[58] *See* 8 U.S.C. §§ 1362, 1229a(b)(4)(A), (B); 8 C.F.R. § 1240.3; *see also Colemenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000).

[59] *See* 8 U.S.C. §§ 208.9, 208.14.

[60] *See* USCIS, Guidance for Implementing Section 235(b)(2)(C) of the Immigration and Nationality Act and the Migrant Protection Protocols, at 3, Jan. 28, 2019, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf.

[61] *Innovation Law Lab v. Nielsen*, 366 F. Supp. 3d 1110, 1116 (N.D. Cal. 2019).

States and also because they would “be unaware that their fear of persecution in Mexico is a relevant factor in determining whether they may lawfully be returned to Mexico.”[62]

The standards of proof differ across stages for a reason. The standard is lower in the “credible fear” and “reasonable fear” interviews conducted before asylum officers because those interviews are *preliminary* assessments that efficiently dispose of facially unsupportable claims for relief under asylum law, the withholding procedures, or the CAT. Asylum seekers who show “credible” or “reasonable” fear in these interviews are then given the chance to make their case to an immigration judge in a full evidentiary hearing where the “more likely than not” standard is applied and where the asylum seekers is provided the safeguards described above. Screening interviews of the type conducted under the MPP or in the “credible fear” and “reasonable fear” contexts are not appropriate fora for applying the “more likely than not” standard because these interviews do not allow asylum seekers a full and fair opportunity to make out a fully developed case regarding their risk of persecution, nor do they provide asylum officers an adequate basis to make a reliable and accurate determination of an individual’s risk of persecution in a given country.

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[62] *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 511 (9th Cir. 2019) (Watford, J. concurring).

Moreover, the MPP fails to provide even the basic procedural protections available to asylum applicants subject to "credible fear" and "reasonable fear" interviews. Upon referral to a "credible fear" interview, asylum seekers are provided Form M-444, titled "Information about Credible Fear Interview," which describes the purpose of the interview and informs the applicant of: (i) the right to consult with other persons (including counsel); (ii) the right to request review of the asylum officer's determination by an immigration judge; (iii) the consequences of a failure to establish "credible fear"; and (iv) the right to rest 48 hours prior to the interview.[63] Before a "credible fear" assessment can proceed, the asylum officer is *required* to confirm that the asylum seeker has received Form M-444 and to verify that the asylum seeker understands the credible fear determination process.[64] Individuals referred for a "reasonable fear" interview are afforded similar protections.[65] These protections are designed to ensure that the United States does not violate its non-refoulement obligation.

The MPP process, however, does not provide any of the safeguards provided to asylum applicants subject to "credible fear" and "reasonable fear" interviews.

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[63] 8 C.F.R. § 235.3(b)(4)(i); *Credible Fear FAQ*, USCIS.gov, https://www.uscis.gov/faq-page/credible-fear-faq#t12831n40242 (last accessed June 25, 2019)

[64] 8 C.F.R. § 208.30.

[65] 8 C.F.R. § 1208.31.

Yet, it imposes a significantly higher evidentiary standard previously reserved for a full-scale hearing before an immigration judge. This mismatch between the high evidentiary standard and the inadequate procedures all but ensures violation of the non-refoulement obligation.

B. Mexico Is Not Safe for Most Individuals Seeking Asylum from Persecution in Central America

Mexico is simply not safe for Central American asylum seekers. As the U.S. Department of State recently noted, "impunity for human rights abuses remain[s] a problem" in Mexico.[66] In 2018, "Central American gang presence spread farther into [Mexico] and threatened migrants who had fled the same gangs in their home countries."[67] There were also reports of kidnapping migrants for ransom or conscription into criminal activity.[68] And despite professing a commitment to protecting the rights of persons seeking asylum, the Mexican government has proven unable to provide this protection. According to an NGO report relied upon by the State Department, 5,824 crimes were reported against migrants in just 5

[66] U.S. Department of State, *Mexico 2018 Human Rights Report*, at 1 (Mar. 13, 2019), available at https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf.

[67] *Id.* at 19.

[68] *Id.* at 20.

Mexican states, and only 1% of the reported crimes were resolved by the Mexican authorities.[69]

The risk of persecution in Mexico is even higher for the most vulnerable segments of asylum seekers. Many asylum seekers are ethnic minorities from indigenous cultures. Members of those cultures face persecution in Mexico that is similar to the persecution they face in their home countries. Indeed, the National Human Right Commission recently recognized that indigenous women are among the most vulnerable groups in Mexican society.[70] Migrant women at large are at particular risk of sexual assault. In one study, nearly one-third of women fleeing the Northern Triangle have experienced sexual abuse during their journey through Mexico.[71] "Given the frequency of sexual and gender-based violence, many migrant women take contraceptives before migrating to avoid the risk of pregnancy from rape by armed criminal groups, locals, or their smugglers."[72]

Sexual minorities also face extraordinarily high rates of persecution and violence in Mexico. According to the UNHCR, two-thirds of LGBTI migrants

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[69] *Id.* at 20.

[70] *Id.* at 28-29.

[71] Doctors Without Borders, *Forced to Flee Central America's Northern Triangle: A Neglected Humanitarian Crisis* 5 (2017).

[72] Anjali Fleury, *Fleeing to Mexico for Safety: The Perilous Journey for Migrant Women*, May 4, 2016, United Nations University, https://unu.edu/publications/articles/fleeing-to-mexico-for-safety-the-perilous-journey-for-migrant-women.html.

from El Salvador, Guatemala, and Honduras who applied for asylum reported having been victims of sexual violence in Mexico.[73]

If migrants entering the United States through our Southern Border are given the protections that our system typically affords to those fleeing persecution, most would be able to establish that they are likely to face persecution in Mexico if forced to stay there. However, they are not able to do so under the MPP because it does not afford them any of the safeguards that our system provides to the persecuted in other contexts.

Asylum officers are duty bound to protect vulnerable asylum seekers from persecution. However, under the MPP, they face a conflict between the directives of their departmental leaders to follow the MPP and adherence to our Nation's legal commitment to not returning the persecuted to a territory where they will face persecution. They should not be forced to honor departmental directives that are fundamentally contrary to the moral fabric of our Nation and our international and domestic legal obligations.

[73] U.S. Department of State, *Mexico 2018 Human Rights Report*, at 19-20 (Mar. 13, 2019), available at https://www.state.gov/wp-content/uploads/2019/03/MEXICO-2018.pdf

III. THE MPP IS NOT DESIGNED TO REDRESS THE CHALLENGES FACING OUR IMMIGRATION SYSTEM

The pre-MPP removal procedures struck an efficient balance between vetting asylum claims and expeditiously removing individuals without a viable asylum claim. The system was not, as the Administration has claimed, fundamentally broken. With adequate resources (*e.g.*, more immigration judges and asylum officers), it is capable of dealing with the flow of migrants seeking to enter the United States through our Southern Border. Rather than redressing the challenges faced by our immigration system, however, the MPP adds to them. It does so in two ways.

First, the MPP actually *increases* the number of asylum seekers who will be given a chance to appear before an immigration judge. The expedited removal procedure set forth in 8 U.S.C. § 1225(b)(1) adequately vetted asylum seekers with viable asylum claims and allowed expeditious deportation of those who lacked such a claim. Specifically, under the expedited removal procedure, individuals who did not present a "credible fear" were expeditiously removed from the country while those who could meet the "credible fear" threshold were allowed to proceed to a formal hearing before an immigration judge. This process promoted efficiency and judicial economy by screening out non-viable asylum claims early in the process, while upholding our Nation's non-refoulement obligations by ensuring

that persons with credible asylum claims are afforded an opportunity to articulate and support those claims through a robust judicial process.

Under the MPP, however, all asylum seekers who are subject to the MPP—regardless of whether they have a "credible fear" of persecution—are processed under the standard removal process set forth in 8 U.S.C. § 1299a that takes place before immigration judges. In other words, individuals who would never see an immigration judge under the expedited removal procedure are now added to the backlog of cases in line for a full hearing. This adds to the already overwhelming burden on our country's immigration judges, and further delays hearings for asylum seekers with meritorious claims.

Second, the MPP diverts the limited resources of asylum officers to carry out a task that they did not perform before—the administration of the MPP. As noted, asylum officers are tasked with administering the "affirmative asylum" process and conducting "credible fear" and "reasonable fear" interviews for asylum seekers from around the world. These processes already faced a backlog before the MPP.[74] The MPP exacerbates the backlog because asylum officers now have to administer the MPP. As a result, there are likely to be delays in the removal of individuals who are unlikely to pass the "credible fear" and "reasonable fear" screenings and

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[74] Office of Citizenship and Immigration Services Ombudsman, *Annual Report 2018*, at 41-42, *available at* https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202018.pdf.

in the processing of claims by those with legitimate claims to asylum who must now wait even longer periods of time for adjudication of their asylum applications.

These inefficiencies underscore that, rather than address the challenges faced by our immigration system due to the flow of migrants across our Southern Border, the MPP exacerbates the problem faced by the system. And in doing so, it violates our Nation's longstanding tradition and international treaty and domestic obligation not to return those fleeing persecution to a territory where they will be persecuted.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urge the Court to affirm the preliminary injunction granted by the district court.

Respectfully submitted,

Dated: June 26, 2019

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 26, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 26, 2019

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